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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NILES VAN BOXTEL, Defendant and Appellant.	H042355 (Monterey County Super. Ct. No. SSC110173A)

Defendant Niles Van Boxtel (defendant) appeals his conviction of making criminal threats against his then-wife, Janet Van Boxtel (Janet). On appeal, defendant asserts there is insufficient evidence to support a finding that his statement to Janet was a criminal threat under Penal Code section 422,[1] subdivision (a). Specifically, he argues that under the circumstances, the threat was not so unequivocal and unconditional that it conveyed to Janet an immediate prospect of execution. We disagree, and affirm the trial court's judgment.

I. STATEMENT OF FACTS AND CASE

A. Background

Defendant and Janet were husband and wife, and, at the time of this incident, were a couple for 33 years. Together with their two sons, they lived on a ranch in Parkfield, a

[1] All further references are to the Penal Code unless otherwise specified.

small and remote town in Monterey County. Defendant had a drinking problem, and ultimately his family had an intervention to address his alcohol abuse. As a result, defendant went to a month-long alcohol sobriety program in Santa Barbara. While defendant was in the program, Janet took $60,000 the couple saved for their sons' college education, and, on the advice of a lawyer, put it in a separate CD in her name. At the time, Janet and defendant did not have steady income, and Janet was afraid that if defendant had access to the funds, he might "take all of it from us, leaving us without, and go off somewhere."

B. The Altercation

On the morning of August 27, 2011, defendant had been home from the sobriety program about two or three weeks. Their sons were not at the ranch; one had returned to college and the other was at work. While it was still early defendant lay down on the couch to take a nap. The phone rang and Janet answered it, retreating into the back bedroom to speak. Defendant followed Janet into the bedroom in a rage, saying that Janet was "poisoning him against everybody." Janet testified she told defendant, "No. It's your friend on the phone. He called to ask how you were. But I didn't want to disturb you, so I took it back here." Defendant slapped the phone out of Janet's hand and left the room. Janet followed him and defendant stated, "Well, I'm just going to tell him he can have you for a keg of beer." Defendant then left the house for a short drive. When he returned to the home, he saw Janet sitting at the dining table and stated, "So what's the story?" Janet relied, "What are you talking about?" It was at this point that defendant stated, "Well you can take me to town now and get me my money, or you can die."

Although defendant's demeanor was calm, Janet testified that she felt she could not really argue with him; that he was not "really there." She described him as being "deadly calm" and in a "state of blackout because he was so angry." She picked up the phone and dialed 911. Defendant stated, "What are you doing?" Janet replied, "Well,

you just said something to me that I don't know how to deal with. So I'm going to tell someone else." While Janet was speaking to the 911 operator, defendant walked towards the back bedroom. Janet knew defendant kept a .44 Magnum by the side of his bed in a holster with ammunition nearby, and indeed had many guns all over the house.

Janet grabbed her purse and keys, left the house, and got in her car. She quickly began to drive away, leaving her two pet Chihuahuas behind because she "didn't have time" to take them and she "had to get out of there." Just as she was getting in her car, she saw defendant come out of the house carrying "that .44 Magnum in his hand." She testified that as she began to drive away defendant pointed the gun in her direction. She heard a pop; and, although the sound did not seem loud enough to be from a gun, she could not be sure because "the blood was just in my ears and I was tunnel visioned [*sic*]."

Janet drove to the Parkfield Café where six deputies were waiting for her. One deputy observed Janet was "crying, shaking, and she appeared extremely frightened." Janet gave the deputies consent to enter her home, secure her residence, and collect her belongings. After the deputies arrived at the front gate to the Van Boxtel property, they looked for a gate key that Janet said was under a nearby rock, but it was missing. Defendant then appeared, driving up to the gate in his Chevrolet Suburban and stopping about 10 yards away. The deputies asked defendant to open the gate, but defendant, talking through the open driver's side window, said nothing had happened, refused to open the gate, and asked them what they "were armed with." He also began to make what the deputies called "grooming gestures": "rubbing his face, moving his hair back, moving his shoulders, loosening up his hands." The deputies described "grooming gestures" as behavior a suspect exhibits when he's about to "run or fight."

Eventually, defendant got out of his vehicle. However, as defendant attempted to get back in his car, the deputies jumped the fence and tackled defendant to the ground, placing him in handcuffs. In defendant's vehicle, they recovered a Remington

model 1100, 12 gauge, pump action shotgun that was loaded with one live round. On his person, they recovered the key to the gate.

At trial, there were a few discrepancies between the deputies' and Janet's testimony, and defendant's. Defendant testified after he entered the house and saw Janet at the dining room table, he was not sure if he said, "Take me to town or you're going to die." Instead, he thought he might have said, "Where is my money? I need it now or the fur is going to fly." He also noted that if he had wanted to get a gun, he would not have had to "reach more than seven feet" for the nearest. He knew that Janet had called 911, but he stated he did not follow Janet outside or point a gun at her. Instead, as he left his home he grabbed a shotgun to continue shooting at pests. He did not shoot at Janet's vehicle; at the same time Janet got inside her vehicle and drove away, he raised his gun and shot a squirrel as it ran across the driveway. The deputies testified that after defendant's arrest, they asked him where the dead squirrel was. Defendant motioned towards a burn barrel—an empty 55-gallon barrel used for burning debris. When one of the deputies examined the burn barrel, he did find a dead squirrel, but it was not "freshly killed"; it was badly decomposed.

An information was filed on August 24, 2012, charging defendant with discharge of a firearm in a grossly negligent fashion (§ 246.3, subd. (a)), drawing or exhibiting a firearm (§ 417, subd. (a)(2)), resisting, obstructing or delaying a peace officer (§ 148, subd. (a)(1)), and, the charge at issue here, criminal threats (§ 422). The case was tried before a jury between March 9 and March 12, and on March 13, defendant was convicted on all counts. The trial court suspended imposition of sentence on all counts and placed defendant on three years' probation.

II. DISCUSSION

On appeal, defendant alleges only that sufficient evidence does not support his conviction on the third element of his section 422 charge, and thus violates his Fourteenth Amendment rights. The third element of section 422 requires that the the threatening

statement "was so unequivocal, unconditional, immediate and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat . . . ." (§ 422, subd. (a).) As we explain below, we conclude that there was substantial evidence supporting the section 422 conviction, and uphold the judgment of the trial court.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" *People v. Bolin* (1998) 18 Cal.4th 297, 331; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 859; see also *People v. Jackson* (1980) 26 Cal.3d 557, 575, 578 [California standard of review for sufficiency of evidence complies with federal constitutional requirements].) "The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792.)" (*People v. Smith* (2009) 178 Cal.App.4th 475, 478-479.)

Section 422 defines a criminal threat as when " '(1) [the defendant "willfully threaten[s] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat—which may be "made verbally, in writing, or by means of an electronic communication device"—was "on its face and under the circumstances in which it [was] made, . . . *so unequivocal, unconditional, immediate, and specific* as to convey to the person threatened, a gravity of purpose and *an immediate prospect* of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and

(5) that the threatened person's fear was "reasonabl[e]" under the circumstances. [Citation.]' ([*People v.*]*Toledo* [(2001)] 26 Cal.4th [221,] 227-228, italics added; [*In re*] George *T.* [(2004)] 33 Cal.4th [620,] 630.)" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 805.)

Defendant asserts that the statement he made to Janet "fell closer to the *equivocal* and *conditional* end of the spectrum" rather than unequivocal and unconditional. In examining section 422, the jury must find defendant's threat "on its face and under the circumstances in which it is made" is "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened[] a gravity of purpose and an immediate prospect of execution of the threat." (§ 422, subd. (a).) Further, " '[t]he use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.' " (*People v. Bolin, supra,* 18 Cal.4th at p. 340.) Defendant argues the circumstances of this case demonstrate that his threat "fell closer to the *equivocal* and *conditional* end of the spectrum" because "the situation was anomalous," emphasizing during the 33-year relationship between himself and Janet, he was never violent against her or their sons. He also highlights his absence of a criminal record.

Defendant's assertion that he had no history of violence or criminal activity is of little weight. While "[t]he parties' history can . . . be considered . . . one of the relevant circumstances," (*People v. Smith, supra,* 178 Cal.App.4th at p. 480), a history of violence between the threat-maker and the victim is not a requirement of section 422. (*People v. Wilson, supra,* 186 Cal.App.4th at p. 815 [no prior history between victim and defendant, but defendant repeatedly escalated the intensity of situation during encounter with victims; upheld.) As the case law states, *ante*, a court or jury is to weigh the surrounding circumstances in making a determination of where defendant's threat lies on the spectrum

of unequivocal, unconditional, immediate and specific; the absence of violence between defendant and Janet up to this point is but a part of that analysis.

Here, the immediate context in which defendant made the threat supports it was unequivocal and unconditional. "In determining whether conditional . . . language constitutes a violation of section 422, the trier of fact may consider 'the defendant's mannerisms, affect, and actions involved in making the threat as well as subsequent actions taken by the defendant.' (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.)" (*People v. Wilson, supra,* 186 Cal.App.4th at p. 808.) The statement need not be absolutely unequivocal, unconditional, immediate and specific, but it must be a sufficient level of those qualifiers to convey to the victim a gravity of purpose and immediate prospect of execution. (*People v. Bolin*, *supra*, 18 Cal.4th 297, 340; *In re Ryan D.*, *supra,* 100 Cal.App.4th at p. 861.)

Defendant made his statement ("You can get my money or you can die"), following an aggressive reaction disproportional to the circumstances: Janet left the room to answer a phone call and to avoid disturbing defendant's nap; he followed her and slapped the phone out of her hand. When defendant returned home after his drive and made the threat, his demeanor was deadly calm and "blackout" angry; Janet had no reason to believe he would not follow through on his threat. Although defendant did not grab the closest gun, in Janet's view this was because defendant wanted to get a specific gun—his .44 Magnum—to carry out his threat.

The seriousness of the threat is also supported by defendant's actions after the threat was uttered; after Janet got out of the house and into her car, defendant followed and fired a shot in her direction. Although defendant maintained he shot a squirrel—and not at Janet—this statement was not consistent with the deputies' search of the burn barrel. Defendant's behavior towards the deputies is also suspect. He did not allow them to enter the property, asked if they were armed, and looked at them through binoculars even though they were 10 yards from each other. Defendant's "grooming" gestures also

demonstrate he was ready to "fight or [flee]." Thus, an observation of defendant's " 'mannerisms, affect, and actions involved in making the threat as well as subsequent actions' " outweigh the absence of domestic violence or a criminal record. (*People v. Wilson, supra,* 186 Cal.App.4th at p. 808.)

Defendant also points out he did not attempt to stop the 911 call, nor did he grab the nearest gun. In his words, the lack of these two actions "dispel[s] the notion that he wanted [Janet] to fear for her life." The argument that defendant did not intend for Janet to fear for her life is undermined by the language of the threat, and by the attending circumstances outlined above. Moreover, section 422 does not require a defendant to intend to carry out his threat. (§ 422, subd. (a); *People v. Wilson, supra,* 186 Cal.App.4th at p. 806 ["section 422 does not require an intent to actually carry out the threatened crime"].) Section 422 requires that the surrounding circumstances demonstrate there is an immediate prospect of execution of the threat, and that the victim is impressed as such. (*People v. Wilson, supra,* 186 Cal.App.4th at p. 817, fn. 3 [appraisal of immediacy of threat under section 422 quite appropriately includes assessment of sense of urgency and foreboding caused to person being threatened].)

Despite defendant's argument, there is ample evidence to support finding that Janet understood defendant meant to carry out his threat immediately. Defendant conveyed to Janet he was ready to execute on his threat by his demeanor (the calm, blackout rage), because he moved towards the bedroom that contained the .44 Magnum, and because he followed Janet outside with a gun and took a shot. Janet's response to those circumstances supports she felt immediate fear. Rather than engage defendant, she called 911; and, when defendant started walking away during the phone call, she understood that to mean he wanted a specific gun to fulfil his threat. Janet responded by immediately leaving the house, getting in her car, and driving away. She did not even pause to take her two pet Chihuahuas with her. When she arrived at the Parkfield Café, the deputies found her shaking and crying.

The record shows that there was sufficient evidence to support defendant's conviction of criminal threats under section 422, subdivision (a). Defendant's statements, when examined under the attending circumstances, were unequivocal, unconditional, immediate and specific, and the threat coupled with his behavior conveyed to Janet an immediate prospect of execution.

III. DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
WALSH, J.*

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* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.